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Erratum

On page 285, footnote 44 which read: Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1956)
Should have read: Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

TORT LAW IN TRANSITION: CHARLES S. DESMOND'S QUARTER-CENTURY ON THE NEW YORK COURT OF APPEALS

JOSEPH LAUFER*

INTRODUCTION

BY the end of 1965, Charles S. Desmond will have served on New York's Court of Appeals for twenty-five years, the last six as its Chief Judge. Few appellate judges enjoy more genuine popularity and more affectionate esteem than the friendly, even-tempered, unassuming and plain-spoken Chief Judge of the State of New York. Few have expressed in clearer language and more succinctly their views on the astonishing variety of legal problems which appellate judges are expected to resolve with ultimate wisdom. Few have shown greater awareness of the realities, human, ethical, social, governmental, that underlie the issues presented to them. Few have been less willing to become entangled in the frayed strands of legal doctrine which seem to thwart the demands of justice. Few have felt more deeply responsible for adjusting judicial thought and action to the needs of a society that is caught in the throes of profound and accelerating change. His jubilee provides a fitting occasion to reflect on his many contributions to New York's law. From among them, I have selected a few of those in which he dealt with issues of tort law, mainly those arising from accidents. I venture to think that, next to the problems of criminal justice, it is that restless subject that has caused him more than its proportionate share of judicial anguish. This may be true, in part, because personal injury litigation has been the cause of one of the glaring blemishes on the contemporary administration of civil justice, namely, the interminable delays in bringing accident cases to trial. To his immeasurable credit Judge Desmond has never relented in his struggle against the notorious public apathy toward this urgent problem. He has been troubled by the law of torts for a related, and no less compelling reason. Recently, he addressed himself to current problems of judicial administration, and more specifically to the jury trial. In stressing the point that jury trials dispose of no more than a minute fraction of tort claims and suits, he observed:

> The plain truth is that our present substantive and adjective law is no longer adequate or appropriate for the almost infinite number of tort suits occurring in our ever more mechanized society. Clearly, an increased claim-consciousness, plus the trend toward compulsory insurance, and the specialization by a sizable segment of the bar in tort claims, have combined to produce a kind and amount of litigation with which old fashioned substantive concepts and court procedures simply cannot cope. And, yet, as William Dean Howells is reported to have once said: "Whatever is established is sacred, to those who do not think."

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> There is an air of unreality about the insistance on jury trials in personal injury suits and, indeed, about the whole business of personal injury lawsuits.[1]

There can be little doubt that the *malaise* over the law of torts which colors these observations is shared by thoughtful members of the profession everywhere. Whether their diagnosis conforms to the Chief Judge's is another question. Indeed, in singling out the public's increased claim-consciousness, the trend toward compulsory insurance and the specialization of the bar he may have meant no more than to illustrate the complex etiology of a disturbing phenomenon. In any event, it should give us pause that, after a quarter-century's judicial toil in weighing and deciding thousands of appeals and writing over one hundred opinions in tort cases, an appellate judge of our most industrialized state could come to such somber conclusions.

Few will question the fact that the near-universal practice of liability insurance has turned modern tort litigation into a pursuit sui generis. Judge Desmond has noted the emergence of a specialized bar. Of equal interest are what may be termed the logistic aspects of modern tort litigation. A small number of insurance companies simultaneously participate in thousands of lawsuits, each conducted in the name of a particular defendant, the insured. Insurance carrier policies and attitudes, responsive to managerial, competitive, financial and strategic needs, are brought to bear on thousands of cases at the same moment. Company policies ultimately determine whether whole groups of cases are settled or carried into active litigation. In contrast, the insurer's control over a private "docket" of tens of thousands of cases also permits it to single out specific cases, not necessarily financially "worthwhile," for testing in the highest courts if a particular legal issue seems strategically significant. The lessons thus learned may be reflected in future company policy and indeed, may be applied by the entire insurance industry. Thus, this type of litigation assumes significance far beyond the adjudication of a legal dispute between private individuals. Where, as in New York since 1956, automobile liability insurance has become compulsory, most New York residents, in a significant sense, are privies to any litigation in which the terms of their compulsory policy are at issue.

As we examine some of the Chief Judge's more prominent opinions in this area, they will yield further clues to the forces that have put legal doctrine and practice, uneasy companions at best, so far asunder that tort litigation, in his words, has "lost contact with reality." And further, we may find that the Judge found it possible—in a field traditionally more hospitable to judicial innovation than any other—to close or at least narrow the distressing gap between the "is" and the "ought" of the law of torts. What follows are brief comments on some of the Judge's opinions whether written for a majority of his court or in dissent.

1. Desmond, *Current Problems of State Court Administration*, 65 Colum. L. Rev. 561, 563-64 (1965).

INTENTIONAL TORTS

One of the common law's arresting anomalies is its failure to develop a general principle of liability for intentional wrongdoing. In contrast, after considerable toil, it proved itself equal to the task with respect to negligent conduct although there the difficulties in applying a broad principle to an infinite range of human activities, seem more formidable. As a result, within the deceptively simple confines of the ancient trespass tort, courts have continued to struggle to this day with a variety of disparate fact situations and policy issues. And, not surprisingly, the decisions although reaching sound results could not always be fitted neatly into those rigid molds. Worse, in heeding the ancient doctrines, many judges failed to find the proper answers. The resulting confusion has inspired eloquent complaints.[2]

In *Phillips v. Sun Oil Co.*[3] Chief Judge Desmond dispelled some of the fog that still hangs over trespass to land in New York. The facts were simple enough. Gasoline leaked from defendant's tank and somehow seeped underground into plaintiff's well, seventy-five feet away. Unable to show that defendant knew or should have known about the seepage, plaintiff abandoned counts based on nuisance and negligence whereupon the trial court dismissed a third count based on trespass to land, a decision that was affirmed both by the appellate division and the Court of Appeals.

Referring to a medley of old cases that dealt with straying cattle, a balloonist's emergency descent, soil subsidence caused by construction work, a flood caused by excavation, Judge Desmond redefined trespass to land:

> Trespass is an intentional harm at least to this extent; while the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must *intend the act* which amounts to or produces the unlawful invasion, and the intrusion must be at least the immediate or inevitable consequence of what *he willfully does*, or which he does so negligently as to amount to willfulness. . . .[4]

If this definition does not still all doubts, it took a step forward toward doctrinal clarity; its emphasis on intentional or at least "willful" conduct makes it plain that a truly accidental intrusion is henceforth not to be considered a trespass.[5]

The mischief caused to our law by the "petrified forest"[6] of the trespass

2. For an example that singles out New York as target, see Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951).

3. 307 N.Y. 328, 121 N.E.2d 249 (1954).

4. *Id.* at 331, 121 N.E.2d at 250. (Emphasis added.)

5. In amplifying his definition, the Judge further quoted from the first Restatement that the trespassory act must be such as "will to a substantial certainty result in the entry of the foreign matter." Restatement, Torts (1934), § 158, comment h. The Restatement Second corrected the ambiguity in the quoted phrase by stating what was evident from the outset: "It is enough that an act is done *with knowledge that it will* to a substantial certainty result in the entry of the foreign matter." (Emphasis added.) Restatement Second, Torts § 158, comment 1 (1965).

6. The phrase is Chief Judge Traynor's who applied it to the traditional body of choice of law rules; Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 670 (1959).

torts and the random nature of the judicial process are neatly illustrated by the aftermath of Judge Desmond's opinion. Heretofore it had been assumed, in the light of both state and federal decisions that in New York operators of airplanes were strictly liable for ground damage caused by aircrashes.[7]

After *Phillips*, a federal district judge held that Judge Desmond's opinion did not change the existing law on ground damage by falling airplanes.[8] Yet, in a major disaster caused by the crash of two jetliners into New York City's streets, state trial courts, relying on Judge Desmond's opinion summarily rejected strict liability for personal injuries and damage to personal property whether based on a trespass theory or on the ultrahazardous character of airplane operations.[9] The second department affirmed[10] and plaintiff was unable to secure review by the Court of Appeals.[11]

Where do we stand? Conceding that the dusty trespass concepts no longer dictate the terms for dealing with aircrashes, are we to assume that, in disposing of an insignificant lawsuit over a small leak in a gasoline tank Judge Desmond meant to dispose of truly major issues in the law of torts? Here the question was whether operators of jet planes with their much higher potential for widespread disaster are strictly liable for injury or property damages to persons on the ground. The second department seemed to have no difficulties in reaching the view that Judge Desmond's opinion precluded strict liability, for it decided without writing an opinion.[12] And Judge Desmond's Court agreed, also without stopping to give us its views. There is certainly an irrational element in the way in which insignificant cases and issues claim the judges' full attention while others, incomparably more important, are hurriedly disposed of per curiam or denied review.

NEGLIGENCE

To place the Chief Judge's contribution in the area of accident law into historic perspective we may note that when he became a judge negligence was still central to all thinking about torts. For this predominance there is abundant evidence. To illustrate, Professor Leon Green had published only a few years earlier a panoramic survey of the law of torts[13] followed shortly thereafter by a similar effort of Professor Francis H. Bohlen,[14] the Reporter of the

7. Hahn v. United States Airlines, Inc., 127 F. Supp. 950 (E.D.N.Y. 1954); Guille v. Swan, 19 Johns Ch. R 381 (N.Y. 1822); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (Sup. Ct. Monroe Co., 1933).

8. Margosian v. United States Airlines, Inc., 127 F. Supp. 464, 466-67 (E.D.N.Y. 1955).

9. Wood v. United Airlines, Inc., 32 Misc. 2d 955, 223 N.Y.S.2d 692 (Sup. Ct. 1961). In accord, save for "abnormally dangerous aircraft" or abnormally dangerous flying, but on the basis of statistics and cases antedating the jet age of the sixties, the proposed Restatement Second, Torts, Tent. Draft No. 10, § 520A.

10. Wood v. United Airlines, Inc., 16 A.D.2d 659, 226 N.Y.S.2d 1022 (2d Dep't 1962).

11. Wood v. United Airlines, Inc., 11 N.Y.2d 1053, 184 N.E.2d 180, 230 N.Y.S.2d 207, *motion for rearg. denied*, 11 N.Y.2d 1114, 230 N.Y.S.2d 1026 (1962).

12. Wood v. United Airlines, Inc., 16 A.D.2d 659, 226 N.Y.S.2d 1022 (2d Dep't 1962).

13. Green, *One Hundred Years of Tort Law*, in 3 Law, A Century of Progress, 1835-1935, 34-79 (1937).

14. Francis H. Bohlen, *Fifty Years of Torts*, 50 Harv. L. Rev. 724 (1937).

first Restatement of Torts. Although the surveys of these distinguished scholars differed from each other, both devoted the bulk of their attention to the law of negligence; neither felt any need to talk about strict liability.[15] A bit earlier, Professor Seavey had published his classic appraisal of Justice Cardozo's contributions to the law of torts. In his view[16] the most notable of Cardozo's opinions were devoted to the clarification of the negligence concept. Although the decision that is likely to remain his greatest achievement, namely, *McPherson v. Buick*,[17] was in fact a decision for a consumer-plaintiff against an industrial defendant, Professor Seavey noted that "in a majority of the tort cases in which [Cardozo] . . . rendered opinions, the court denied the plaintiff recovery and, in most of the cases, deprived him of the judgment which had been awarded to him in a lower court."[18] As we are all aware, the intervening years—the years of Chief Judge Desmond's tenure—have brought startling changes in the picture of the law of torts as reflected in those writings: Most of the changes have tended to make it easier for all courts, including the Court of Appeals, to grant rather than to deny recovery to plaintiffs.

If the concept of negligence has not further been refined it has certainly been substantially expanded for the benefit of plaintiffs in a steadily widening variety of fact situations. Paralleling this expansion there has been a steady and continuing erosion at the very core of the concept. It became, for one reason or another, ever easier for plaintiffs to establish negligence. Most of the erosion was the result of the greater concern of our society with the welfare of its members; the rising tide of liability insurance made it possible to distribute and thus minimize the cost of a widening responsibility. The net effect has been in many instances what Professor Ehrenzweig has identified in an apt if ironic epigram as "negligence without fault."

Even as thus modified, the negligence concept appears to be yielding its central place in the tort universe as we are entering an era in which the notion of strict liability will serve as a complement if not counterpoise to the fault principle. As we shall see, so far as the law of New York is concerned, the vigorous Chief Judge often had a hand, or at least his say, in these broad developments most of which I suggest he approved in principle if not always in the particular context that was before him.

Limitations on Duty

Judge Desmond's approval of the broad trend toward greater protection for accident victims is by no means unqualified or uncritical. There are at least two important areas in which he refused to join a majority of his court in liberalizing existing law. In a third, involving parental immunity, he spoke for

15. See the fleeting reference to Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), in Green, *supra* note 13, at 41, 42.
16. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 Colum. L. Rev. 20 (1939).
17. 217 N.Y. 382, 111 N.E. 1050 (1916).
18. Seavey, *supra* note 16, at 21.

a strong majority in upholding the established rule. In two other situations, however, he firmly rejected the traditional immunity rules, once speaking for the majority and once in dissent.

1. *Emotional Harm*

In a 1961 case[19] the infant plaintiff alleged that defendant's employee had negligently failed to lock her securely into a ski-lift and that, as a result, on her descent she suffered "severe emotional and neurological disturbances with residual physical manifestation." The majority held that a cause of action had been stated. To reach this result it overruled a sixty-five year-old precedent that had required a physical "impact" on plaintiff as a condition of recovery for mental harm and its results.[20] The majority pointed to the many inconsistencies of the old "impact" rule, to the strong trend in other jurisdictions against it, to the numerous law review articles urging its elimination. The opinion might have stressed, although it did not, that the new rule was formulated in an instance where plaintiff was negligently exposed to *physical* harm. None of these considerations kept Chief Judge Desmond from disagreeing. He joined in dissent with Judge Van Voorhis who bluntly voiced his fears of seeing a broader rule of liability pressed in practice to its extreme conclusion. In Van Voorhis's view such a rule would add a "fertile field" to the constantly enlarging recoveries, with "an influential portion of the bar organized as never before to promote" that objective, with medical experts "for a consideration" expressing opinions that cause and effect existed, and with courts and juries uncritically accepting their opinion as fact.[21]

2. *Mental Strain Causing Heart Attacks*

The Chief Judge voiced another, not unrelated dissent from an important innovation in the field of workmen's compensation: In a leading case[22] the majority held that an employee's fatal heart seizure brought on by anxiety and mental stress arising out of his employment is an industrial accident within the reach of New York's workmen's compensation statute. In that case, the employee, a 33-year-old engineering executive, was blamed by the airline's president when a federal agency grounded one of the company's two planes because it had been poorly maintained. The employee lived through a short period of extreme stress and anxiety during which he desperately struggled to minimize the delay and expense of the needed airplane repairs. Although he had shown no previous cardiac symptoms, his grim experience culminated in a fatal heart attack. Judge Desmond firmly rejected the majority's holding "as an unprece-

19. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).
20. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).
21. Battalla v. State, 10 N.Y.2d 237, 243, 244, 176 N.E.2d 729, 732, 219 N.Y.S.2d 34, 39 (1961).
22. Klimas v. Trans Caribbean Airways, 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961).

dented decision."[23] In his view, granting awards for heart attacks caused by purely mental stress, in the absence of some definite physical exertion, would make, as Judge Finch had warned almost thirty years earlier, "workmen's compensation the equivalent of life and health insurance"![24] He could see no statutory basis for classifying the employee's heart attack an "industrial accident" which alone would justify an award. Changes, he felt, if thought desirable must come from the legislature.

The dramatic circumstances of this case make Judge Desmond's distinction between physical and mental strain seem arbitrary. Thus, on the facts, the majority holding seems preferable. Yet, the larger issue remains. Can the majority's rule, depending as it does, on a careful weighing of facts, be meaningfully applied in the administration of "mass justice" by workmen's compensation boards? In the light of the avalanche of administrative and judicial awards in heart seizure cases which followed this case, one cannot help feeling that Judge Finch's early warning, echoed by Chief Judge Desmond, accurately predicted the course of events.

3. *Parental Immunity*

Finally, we should note a third instance where the Chief Judge, this time as the spokesman for most of his brethren, refused to abandon an immunity rule that has come under increasing attack. In *Badigian v. Badigian*[25] an infant, three years old, was injured when his father left his car unlocked, and the infant, after releasing the brakes, tried to jump from the vehicle. Judge Desmond, in a very brief opinion, affirmed the dismissal of the child's cause of action against the father. He viewed the parental immunity

> as a direct application of a concept that cannot be rejected without changing the whole fabric of our society, a fundamental idea that is at the bottom of all community life. The basic principle is that children and parents form a unique kind of social unit different from all other groups.[26]

While he conceded the existence of certain exceptions from the immunity rule, he saw them as falling outside the normal parental relationship, *e.g.*, where the injury is intentional or committed in the course of the parent's business. There may be need for special provision if disability continues beyond infancy but to meet that need is the legislature's business. Judge Jacobs of the Supreme Court of New Jersey dissenting from a similar ruling handed down in the same year, noted that the immunity "has been universally condemned in the thoughtful professorial and student writings on the subject."[27] Judge Desmond shows little patience with these academic exercises: "the writers who attack the

23. *Id.* at 216, 176 N.E.2d 719, 219 N.Y.S.2d at 19.
24. Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 317, 12 N.E.2d 311, 319 (1938).
25. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).
26. *Id.* at 474, 174 N.E.2d at 719, 215 N.Y.S.2d at 36-37.
27. Hastings v. Hastings, 33 N.J. 247, 254, 163 A.2d 147, 151 (1961).

no-liability rule misunderstand its basis and purpose."[28] It is improper, in his view, to point to compulsory insurance as justifying the demise of the immunity rule: current insurance rates do not contemplate indemnity since they are based on recent loss experience which does not include the type of suit here contemplated. Interestingly enough, he does not advance a modern, pragmatic argument in favor of continuing the immunity, namely, the danger of too much rather than too little family harmony, or less frivolously, the danger of fraud by the family unit.

Should we agree with two commentators who concluded, "The Court of Appeals missed a golden opportunity to overhaul an antiquated judicial doctrine."?[29] It would seem that the elaborately documented dissent by Judge Fuld refutes many of the arguments in favor of the immunity. It is evident that Judge Desmond's grand generalization about the family unit proves too much; immunity ends when a child comes of age; it never applies where property relations are at stake. And is not the crushing burden of a severe accident apt to break a family? If this unique kind of social unit must remain so totally immune so as to avoid changing the fabric of our society, it should not be amenable even to legislative innovations. Furthermore, how do we explain the rejection of the immunity in common law jurisdictions outside the United States?[30] The immunity rule in fact is judge-made and of fairly recent vintage, having been proclaimed for the first time in 1891 in Mississippi in a suit for a child's malicious confinement.[31] The lack of common law precedents may be explained by the fact that, absent insurance or other unusual circumstances, the economic incentive for suing was lacking. Finally, the argument that current insurance rates are not geared to the new liability carries weight only if it could be shown—and this is unlikely—that such claims would appear in very substantial numbers. Otherwise they are not likely to affect the rate-making process; contrary to what lawyers and law professors have assumed, rate-making is not a very precise process.[32] In any event, the insurance industry eventually would adjust itself to new rules of substantive law, as it has done on numerous other occasions. Yet, nagging doubts remain. Should we permit the negligent father to benefit, along with the child victim, from the funds supplied by insurance? Is not this benefit different in kind from the relief which liability insurance is designed to provide for the insured tortfeasor? Would we, in effect, convert a liability policy, in this instance, into a sort of family accident policy? Whatever the answers, the absence of American precedents shows that other jurisdictions continue to agree with the result if not the reasoning of the Chief Judge's opinion.

28. 9 N.Y.2d 472, 474, 174 N.E.2d 718, 719, 215 N.Y.S.2d 35, 36 (1961).
29. Goebel & Rashap, *Family Law, 1961 Survey of N.Y. Law*, 36 N.Y.U.L. Rev. 1549, 1559 (1961).
30. See, *e.g.*, Fleming, Law of Torts 644-45 (3d ed. 1965), and cases cited in n.2.
31. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891).
32. Cf. Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 550 (1961).

4. *Prenatal Injuries*

The overruling of precedents calls into play an appellate judge's highest skills. To be truly successful, the act must elude many hazards. The judge must not cross over the uncertain line that divides judicial from legislative competence. To avoid being left stranded, he may not venture too far in advance of what he perceives to be the community's sense of justice, in itself an elusive datum. In trying to articulate its true meaning he must not be distracted by the clamor of partisan interests. Finally, he must search out both the right moment and the compelling case for the venture so as to cushion the shock of discontinuity.

Measured by these criteria, among Judge Desmond's opinions that broke with precedents, *Woods v. Lancet*[33] offers a classic model for the casebooks. Plaintiff claimed that defendant permanently maimed him by an injury negligently inflicted when he was still in his mother's womb, during her ninth month of pregnancy. Thirty years earlier, in a case involving similar facts, the Court of Appeals had held such a claim inadmissible.[34] Judge Desmond, speaking for a majority of the Court (Judges Lewis and Conway dissenting) overruled the earlier decision, and held that plaintiff's claim could be maintained. The Judge's opening words appeal with the sober eloquence that is often present in his opinions, to our sense of justice: "It will hardly be disputed that justice (not emotionalism or sentimentality) dictates the enforcement of such a cause of action."[35]

In conforming the "law" with "justice" the opinion first proceeds to show that the old rule had lost whatever vitality it once may have claimed. It "must be examined against a background of history and of the legal thought of its time and of the thirty years . . . since it was handed down."[36] The Court had formulated it in 1921 because it could find no precedent justifying recovery by an infant for a pre-natal injury. Moreover, it thought proof of the damage was too elusive to be evaluated and finally, on a more theoretical plane, it agreed with a view expressed by Mr. Justice Holmes another thirty-seven years earlier that a child *en ventre sa mère* has no separate existence from her and hence she alone could recover whatever damages may be allowable.[37]

None of these reasons have remained strong enough to withstand the light of present-day thought. The evidentiary difficulties of proving an injury under these circumstances are not special to a child's suit; the trial courts and many administrative tribunals face similar problems daily in thousands of cases. In any event, "it is an inadmissible concept that uncertainty of proof can ever destroy a legal right."[38]

33. 303 N.Y. 349, 102 N.E.2d 691 (1951).
34. Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).
35. Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951).
36. *Id.* at 352, 102 N.E.2d at 692.
37. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).
38. Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695 (1951).

The Judge has little use for the purported theorem that a nine-month foetus *in utero*, later born alive, is not "a being in esse." "To hold, as matter of law, that no viable foetus has any separate existence which the law will recognize is for the law to deny a simple and easily demonstrable fact. This child, when injured, was, in fact, alive and capable of being delivered and of remaining alive, separate from its mother."[39]

The final and, in the Judge's view, "basic"[40] reason for the old rule was the lack of precedent for it, both within the state and elsewhere. Since 1921 a number of appellate courts in the United States and in Canada have permitted infants in plaintiff's situation to sue the tortfeasor. Moreover, "of law review articles on the precise question there is an ample supply."[41] They all condemn the old rule. Thus, the only argument in the way of reversal today is stare decisis. Here Judge Desmond vigorously expresses his philosophy of the judicial function in deciding torts cases:

> [Lack of precedent] . . . is not a very strong reason . . . in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice. . . . The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule.[42]

While the appellate courts of only five states had upheld the infant's right to sue before Judge Desmond wrote this opinion, the year 1951 marked the beginning of what Dean Prosser has described as "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[43] It is characteristic of the rapid movement of the law of torts that since 1951 the battle has moved into new ground. Sooner or later the Court will face such issues as whether a child may sue for an injury suffered before it became viable, *i.e.*, capable of separate existence, and whether it should continue to deny a wrongful death action on behalf of the next of kin of a child stillborn as a result of a prenatal injury.[44]

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39. *Id.* at 357, 102 N.E.2d at 695.
40. *Id.* at 353, 102 N.E.2d at 694.
41. *Id.* at 349, 102 N.E.2d at 693.
42. *Id.* at 355-56, 102 N.E.2d at 694.
43. Prosser, Law of Torts 356 (3d ed. 1964).
44. See, Matter of Logan, 4 Misc. 2d 283, 156 N.Y.S.2d 49 (Surr. Ct. 1956) (no recovery in event of miscarriage, *aff'd*, 2 A.D.2d 842, 156 N.Y.S.2d 152 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 800, 144 N.E.2d 644, 166 N.Y.S.2d 3 (1957); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1956) (viability at time of injury not a condition

5. *Municipal Duties*

In light of the painful inadequacies of the public services provided by our cities and their steadily mounting problems, the Judge's attitude toward municipal tort liability is particularly significant. Cardozo's famous decision in *Moch v. Rensselaer Water Co.* had held in 1928 that a citizen could not recover for the negligent failure of a waterworks company to supply, after notice of a fire, the water pressure which it had contracted to provide.[45] The main reason given by Judge Cardozo is not persuasive, namely that the passive withholding of a benefit (*i.e.*, the water needed to quench the fire) was not an actionable tort. Had not defendant negligently lulled plaintiff and the city into inaction, *i.e.*, into a failure to secure other protection against fires? The decision (widely followed elsewhere) has, however, been defended on policy grounds. It freed waterworks and municipalities from potentially crushing burdens; since property owners are usually insured against fire losses, a contrary rule would simply enable the insurance companies to reimburse themselves by way of subrogation.

Shortly after this decision, the New York legislature abolished the sovereign immunity of the state[46] and in 1945, a unanimous Court of Appeals swept aside all remaining governmental tort immunities by declaring that "the legal irresponsibility . . . enjoyed by . . . [counties, cities, towns and villages] . . . was nothing more than an extension of the exemption from liability which the State possessed."[47] It reached this momentous decision in a case in which a runaway police department horse had severely injured the plaintiff.

A few months later, the Court of Appeals again faced an issue not unlike *Moch*.[48] The plaintiff's house was destroyed when, upon the outbreak of a fire, it proved impossible to combat it because the city had negligently failed to maintain the valves and hydrants regulating the water pressure. Relying on *Moch*, the majority affirmed the dismissal. Judge Desmond dissented on the ground, *inter alia*, that the *Bernardine* doctrine broadly abolishing governmental tort immunities applied not merely to the conduct of a police department but a fire department as well. An actionable wrong is stated at least where "the city failed to keep its fire equipment in good order, with resulting damage to the property of the citizen. . . ."[49]

Quite recently, the City of Amsterdam was sued for its negligence in failing to take action against violations of the Multiple Residence Law. According to the pleadings, after a fire occurred in an apartment building, a captain of the city fire department directed the tenant to discontinue using a leaking oil heater until it was repaired. The captain did not report to the Commissioner

for recovery), *appeal granted*, 283 App. Div. 914, 129 N.Y.S.2d 914 (3d Dep't 1954) for the best general discussion, see Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579 (1965).

45. 247 N.Y. 160, 159 N.E. 896 (1928).
46. N.Y. Ct. Cl. Act § 8.
47. Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945).
48. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).
49. *Id.* at 59, 64 N.E.2d at 708.

of Public Safety nor did he warn the landlord. No action whatever was taken by the city. The use of the leaky oil heater continued and caused a second fire which killed and injured several people. The majority affirmed the dismissal of the complaint.[50] It held that there was no *general* liability to the public for civil damage in event of failure to supply adequate policy or fire protection. If liability is imposed in certain cases, it is done because failure to comply with the particular statute involved results in damage to one of a class for whose special benefit the statute was enacted. Judge Desmond was the lone dissenter. After enumerating the frequent instances in which tort liability was imposed for various municipal failures to comply with statutory commands, he concluded:

> The time has come to remove from our law all the remaining vestiges of governmental immunity. We should be done with exceptions and incongruities. We should cut through the wilderness of special instances and say, as we did of hospital immunity in *Bing v. Thunig* . . . , that municipal nonliability for injury-causing breaches of duty is archaic and unjust. Cities should be held to the same standards of conduct as apply to private persons, since risk of liability (*and insurance against the risk*) is incidental to municipal activities.[51]

Damages—The KILBERG *Landmark*

It would be inappropriate on this occasion not to mention here Judge Desmond's famous contribution to the conflict law of torts, namely *Kilberg v. Northeast Airlines*.[52] Plaintiff's intestate, a New Yorker and a passenger on defendant's plane bound from New York to Massachusetts, died when the plane crashed near Nantucket. Plaintiff sued to recover damages of 150,000 dollars (including loss of prospective earnings) based on defendant's breach of contract for decedent's safe carriage. The trial court refused to dismiss this cause of action but the appellate division reversed, considering it, despite its contract label, as sounding in tort and hence subject to the 15,000 dollar damage limit of the applicable Massachusetts wrongful death statute. It took Chief Judge Desmond only a few lines to conclude that the appellate division rightly dismissed the cause of action based on contract. In this conclusion, his entire court concurred. Yet, he and three of his brethren would not halt here. He noted that, in the trial court, plaintiff had yet another cause of action pending. Sounding in tort, it sought only the maximum allowed under the applicable Massachusetts wrongful death statute, namely 15,000 dollars. Addressing himself to this cause, Judge Desmond concluded that it would not be subject to the 15,000 dollar limit—a limit that plaintiff, of course, had sought to escape by framing his other cause of action in contract. What led the Judge to this unorthodox conclusion? Considering the speed and the hazards

50. Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965).
51. *Id.* at 141, 204 N.E.2d at 638, 256 N.Y.S.2d at 599-600. (Emphasis added.)
52. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

of air travel, he pointed out "the place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters."[53] This protection, he found, could be granted "conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules."[54] Pointing to a provision of the New York constitution specifically banning any limitation on damages, he noted that the policy against limiting recoveries in wrongful death actions was ". . . strong, clear and old."[55] Hence, the Court must refuse to enforce that part of the Massachusetts wrongful death statute precisely as it had done when comparable attempts were made to limit recovery by contractual stipulations. Moreover, since the Court had never decided the issue whether the measure of damages in wrongful death actions is procedural or substantive it should opt for the procedural characterization "particularly in view of our own strong public policy as to death action damages . . . ."[56] This would result in applying New York's law to the measure of damages. Hence, the Court concluded plaintiff "may apply if he be so advised for leave to amend his . . . [tort] cause of action accordingly."[57]

Judge Fuld flatly refused to deal with the tort claim since he thought the court not entitled "to discuss or decide an issue which not only is not argued by the parties, but actually is not raised or presented by the record."[58] Yet he indicated that so far as the *contract* claim was concerned, stare decisis alone, rather than reason, prevented the Court from applying the New York wrongful death statute (which knows no damage ceiling) to this claim. For clearly, compared with the "adventitious . . . crash" in Massachusetts, New York, where the parties contracted for safe carriage, had the "more significant contact" with the case. Judge Froessel, another dissenter, believed, too, that the majority went beyond its province in considering the tort claim. But in contrast to Judge Fuld, he met head-on the merits of the majority's holding on that claim; he declared it to be contrary to established principles of the law of conflicts both in New York and elsewhere, and thought that it raised, in fact, grave doubts about its constitutionality.

This cannot be the occasion for examining the conflicts aspects of this bold opinion. Suffice it to say that academic and judicial opinion has widely endorsed Judge Desmond's refusal in this instance, to shackle, in a New York forum, a New York citizen's claim by the obsolete and inequitable restrictions of a foreign statute so clearly repugnant to New York's policy and interest. His opinion has greatly stimulated and will continue to stimulate legal thought and writing; it has paved the way, in New York and other states, for further

53. *Id.* at 39, 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135.
54. *Id.* at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 135.
55. *Id.* at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.
56. *Id.* at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.
57. *Id.* at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 138.
58. *Id.* at 42, 172 N.E.2d at 530, 211 N.Y.S.2d at 138.

advances of the law of conflicts, as illustrated by the equally well-known *Babcock v. Jackson*[59] decision and its numerous progeny.

Yet, some marginal comments on this landmark decision seem appropriate; for it discloses some of the Judge's conceptions of the judicial function. The holding was criticized for its unusual notice, just mentioned, to the parties that the Court would disregard the Massachusetts ceiling on damages if the wrongful death claim were brought before it. This notice was given although the claim was not pending on appeal and although it had not been briefed and argued. The late Professor Currie stoutly and, in my view, rightly, defended Judge Desmond's action. He stressed that the real concern of both parties was with the Massachusetts ceiling on damages, not with the abstract division of tort and contract. Once the Court had concluded that the contract theory was inadmissible but, nevertheless, the ceiling on damages should be disregarded, an abstemious, discreet judicial silence might, in Mr. Currie's view, simply have precipitated another round of appeals, or worse, a settlement in ignorance of the Court's considered view of the law.

To this may be added that, in the common carrier situation, the contract-tort dichotomy has a singularly arbitrary character; for instance, early decisions clearly indicated that, had the victim survived, unlimited damages *ex contractu* would have been recoverable. Moreover, the appellate division itself was unimpressed by the distinction. It noted that the contract cause of action was "patently [seeking] . . . to avoid the recovery limitations of the Massachusetts death statute."[60] Conceding that it was "seductively clothed in form *ex contractu*,"[61] the court refused to consider it as anything but a *tort* action. If so, why make a fetish out of an appellate rule when the risks of doing injustice or causing further litigation are so high? Finally, the Court may not have been unaware that the crash had claimed other victims whose representatives were seeking compensation. Should they, too, have been kept in the dark on the Court's real thinking? If Judge Desmond's holding was "dictum," it certainly was comparable to those he and Judge Fuld repeatedly uttered in the warranty cases.[62a] These carefully considered statements of the law are sui generis, a modern form of prospective overruling of precedents of which we will doubtless see more in the future. They should be welcomed rather than criticized.

The dissenters also objected to the majority's readiness to decide without the benefit of briefing and argument; the short answer is that this practice while not common is surely not beyond the province of an appellate court. Not only the Court of Appeals but the Supreme Court of the United States has followed it from time to time even in cases as fateful as *Erie Railroad Co. v. Tompkins*[62] and *Mapp v. Ohio*.[63]

59. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
60. Kilberg v. Northeast Airlines, 10 A.D.2d 261, 262, 198 N.Y.S.2d 679, 680 (1st Dep't 1960).
61. *Id.* at 262, 198 N.Y.S.2d at 681.
62. 304 U.S. 64 (1938).
62a. See pp. 292, 294, 295 *infra*.
63. 367 U.S. 643 (1961).

Almost as fascinating as the decision itself was its immediate aftermath. First of all, paradoxically, the plaintiff did not seize the unusual opportunity offered by the majority opinion. Since the decedent was single, plaintiff was unable to establish dependence of the next of kin on the decedent significant enough to warrant a claim beyond the 15,000 dollars. Hence he accepted a settlement even below this amount.[64] Secondly, the administratrix of another New Yorker who had died in the same disaster had filed a diversity suit against the airline based on the Massachusetts wrongful death statute. The district court for the southern district of New York felt bound to follow the *Kilberg* holding and, accordingly, entered judgment for the plaintiff for some 135,000 dollars.[65] The Second Circuit reversed on the ground that the *Kilberg* ruling was unconstitutional, a ruling which it labeled, in its five-page opinion, no less than seven times as a "dictum": to apply the Massachusetts wrongful death statute stripped of its ceiling on damages violated the full faith and credit clause. Judge Kaufman, in a detailed and vigorous dissent, defended the constitutionality of the *Kilberg* holding. Shortly thereafter, the Second Circuit reconsidered the appeal en banc and by a 6:3 decision repudiated the panel's holding that *Kilberg* was unconstitutional.[66] Judge Desmond had been vindicated.

Strict Liability

The law often advances with scant regard for doctrinal niceties. A judicial or legislative innovation may outdistance, as it were, its own doctrine. Judges and writers then struggle to come to terms with the newcomer and to assign it a fitting place in the conceptual edifice. The effort may continue for decades and longer. The modern branches of strict liability illustrate the point: vicarious liability, liability for ultrahazardous activities, workmen's compensation, all have given rise to intense theoretical controversies which continued long after the new dispensations had become firmly entrenched in legal practice.

We may be witnessing a similar phenomenon in the instance of products liability. It is here that during Judge Desmond's tenure the most significant changes have taken place. For better or for worse, the view has gained wide acceptance that losses due to a personal injury inflicted by a defective product should not be borne by the ultimate consumer even if he cannot establish the maker's fault. What led to this shift of public opinion? Was it prompted by the notion that, typically, the modern industrial giants with revenues larger than those of most modern states, are better able to absorb the loss? Is it thought, less primitively, that most manufacturers are able to treat the loss as a cost of doing business and spread it by insurance or by other means? Is

64. Pearson v. Northeast Airlines, 307 F.2d 131, 132 n.3 (2d Cir. 1962) Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, reprinted in Currie, *Selected Essays on the Conflict of Laws* (Duke U. Press, 1963) ch. 14, p. 690.

65. Pearson v. Northeast Airlines, 199 F. Supp. 539, *motion for judgment n.o.v. denied*, 201 F. Supp. 45 (S.D.N.Y. 1961).

66. Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962).

this view an unexpected by-product of the psychological pressures exerted by modern merchandising practices? Is it a compound of these and other reasoned or instinctive reactions to the recent advent of the new industrial and welfare society? Whatever the answer, legal doctrine and practice are faced with the painful chore of making room for a new principle. The chore is especially critical for two reasons. First, the principle is as yet inchoate. The doctrinal explanations may influence its reach. Secondly, the principle itself, like all notions of strict responsibility, challenge the *raison d'être* of traditional tort law. If society's concern is no longer with defendant's fault but with compensation for the injured plaintiff, compensation that is to be recouped through "loss distribution," what criteria set it apart from social security which, similarly, distributes a growing number of life's hazards among the many?

In 1961 the Court of Appeals, speaking through Chief Judge Desmond, joined the vanguard of American judges who saw the problem as a challenge to judicial rather than legislative action. In doing so, the Court returned to a pioneering role which it had first assumed in 1916. In *MacPherson v. Buick*[67] Judge Cardozo had placed the relation of private consumer to the manufacturer of a defective product squarely into the context of negligence. To accomplish this, he swept aside the privity rule which until then had prevented a direct action by the consumer against a negligent manufacturer. The new doctrine dispensed with privity in damage suits by ultimate purchasers against the makers of defective products which were likely to endanger them. Almost fifty years later, the Court was evidently primed to re-examine the same central issue in light of the widely felt need to expand consumer protection beyond the confines of negligence. Yet, this time the random character of the judicial process denied the judges the chance of a similar, classic confrontation.[68] Instead, on three successive occasions the Court had to deal with somewhat different, if related aspects of consumer protection in our industrialized society. As a result, its efforts to formulate new doctrine became more difficult and controversial.

Greenberg v. Lorenz

The first occasion for the new departure was simple enough. A 15-year-old girl sued a grocer who had sold a can of salmon to her father. A sliver of metal embedded in the salmon had injured her mouth. The Court speaking through Judge Desmond held her claim based on breach of implied warranties of fitness and wholesomeness stated a cause of action although her father, not she, had purchased the can.[69]

With characteristic directness, Judge Desmond pointed to the numerous precedents which had denied similar warranty claims on the ground that privity

67. 217 N.Y. 382, 111 N.E. 1050 (1916).

68. Such confrontations occurred in a number of cases elsewhere, above all in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) and in Greenman v. Yuba Power Products Inc., 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1962). They held the manufacturer strictly liable.

69. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

between plaintiff and defendant was lacking. He saw the Court's difficulty "not in finding the applicable rule but in deciding whether or not to change it." He pointed to a "lengthy bibliography" of writings urging this departure from the strict privity rule,[70] to legislative apathy in the face of repeated requests to relax that rule by statute and finally to the restiveness among the lower courts over its continued survival.[71] Concluding that it is neither just nor sensible to confine the warranty's protection to the individual buyer, he observed that henceforth "[A]t least as to food and household goods, the presumption should be that the purchase was made for all the members of the household."[72]

Thus stated, the new presumption was a relatively limited if welcome step forward, taken after quite a few other jurisdictions and the Uniform Commercial Code[73] had shown the way. Indeed, Judge Froessel in a concurring opinion meant to go thus far but no further; he would have left it to the legislature to adopt whatever further action were needed. The Chief Judge, however, as well as the remaining judges, was evidently persuaded that the time for action had arrived, and he was ready to serve notice of impending changes. Judge Desmond observed that the development of privity and warranty law were traditionally within the domain of judicial responsibility since the former was judge-made and the latter, at least historically, was thought of as sounding in tort. Referring to *MacPherson v. Buick,* he forcefully stated: "Alteration of the law in such matters has been the business of the New York courts for many years." Implying that the present facts were not the only illustration of the harshness attending the privity rule he continued: "So convincing a showing of injustice and impracticality calls upon us to move but we should be cautious and take one step at a time . . . ."[74]

There is irony in the fact that these momentous dicta were first uttered in a case against a retail grocer. Judge Froessel, although, as noted, concurring in result, was moved by the defendant's plight. And why not? In any rational scheme of consumer protection, the case against the retailer is weakest. Unless we think of the great chain stores, a retail grocer usually merely distributes another's wares, may not always be alert to the need for full insurance protection and even if able to pass on the loss to his supplier is often poorly equipped to withstand the initial shock of liability. Moreover, the growth of long-arm jurisdiction has lowered the jurisdictional walls that, in the past, sheltered the producer from a consumer's claims.

On the other hand, it is also true that Judge Froessel's plea was rejected thirty years earlier by another Chief Judge of the Court. Cardozo then held a

70. *Id.* at 199, 173 N.E.2d at 775, 213 N.Y.S.2d at 41.

71. Judge Starke, of the Municipal Court of New York had pleaded for a change in an opinion of 32 pages; Parish v. Atlantic & Pacific Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (1958).

72. Greenberg v. Lorenz, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 776, 213 N.Y.S.2d 39, 42 (1961).

73. N.Y.U.C.C. § 2-318.

74. Greenberg v. Lorenz, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 776, 213 N.Y.S.2d 39, 42 (1961).

grocer similarly liable when a wife, deemed to be her husband's agent, had bought a loaf of packaged bread from a grocer. The husband sued him when a pin concealed in the bread hurt his mouth. The Court of Appeals upheld the judgment against the defendant.[75] Cardozo first read into the sale the grocer's warranty of "merchantability."[76] He then held that the usual rule of damages for its breach, *i.e.*, merely the difference in price between a defective and a "merchantable" item did not apply because here personal injuries were foreseeable if the warranty were breached. Hence, the damages were measured by the full amount of injuries suffered. Cardozo displayed little sympathy for the innocent grocer's plight: "The burden may be heavy. It is one of the hazards of business . . . . [T]he law casts the burden on the seller, who may vouch in the manufacturer if the latter was to blame. The loss in its final incidence will be borne where it is placed by the initial wrong."[77] Why the initial *wrong*? Even in 1931 the manufacturer was liable to *his* privies for his product's "merchantability" although innocent of any wrong.[78] Here we have the nucleus of strict liability as we see it unfolding today. To be sure, it still lies concealed under the misleading terminology and the limitations of warranty and was used in a "food" case. But Cardozo's reinterpretation of "merchantability" and of the rule of damages attending the breach of this warranty transformed their function. What was originally tailored to meet the needs of merchants dealing among each other, has now become an instrument of consumer protection. Perceptively, a contemporary student commentator diagnosed Cardozo's opinion as symptomatic of the spread of strict liability. Not unlike Judge Froessel he called for legislation, a call that at least during his generation, went largely unheeded.[79]

Randy Knitwear Inc. v. American Cyanamid Co.

The second of the trilogy of cases was brought not by a private consumer but a garment maker. Defendant promoted one of its products, an industrial resin as a chemical agent that would "shrink-proof" fabrics.[80] Defendant saw to it that its labels were attached to fabrics and garments treated with its product. Plaintiff, relying on defendant's widely advertised representations about its product's efficacy, bought from two mills fabrics treated with the resin and thus supposedly immune to shrinking. When garments cut from the "shrink-proofed" cloth shrunk when washed, the garment maker suffered heavy commercial losses.

75. Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).
76. N.Y. Sess. L. 1911 ch. 571, as amended N.Y. Sess. L. 1941 ch. 47, § 7 (now N.Y.U.C.C. § 2-314).
77. 255 N.Y. 388, 395, 175 N.E. 105, 107 (1931).
78. It was not until 1938 that the Court held a breach of an implied warranty a wrongful act and a tort for purposes of a wrongful death action, Greco v. S. S. Kresge Co., 277 N.Y. 26, 34, 12 N.E.2d 557, 561 (1938).
79. Note, 16 Cornell L.Q. 610, 614 (1931).
80. Randy Knitwear Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

Judge Fuld, speaking for a majority of the Court (the other judges concurred in the result) refused to let the resin producer invoke the rule of privity against the garment maker's claim that he had breached an express warranty. In a world of advertising through mass media, distinctive labeling, and other devices, the policy of protecting the public against misrepresentation of the advertised and labeled wares, assumed, in the Court's view, paramount importance. The judge-made rule of privity must yield so that protection may be afforded to those at whom the advertising is aimed even if they had not dealt with the manufacturer. This overriding policy of protecting the public led the Court further to reject explicitly defendant's contentions that it did not supply a defective chattel but merely a chemical ingredient used in treating another's product. Nor did it matter that the plaintiff was an industrial rather than a private consumer or that it suffered commercial loss rather than personal injury or property damages.[81]

The holding is noteworthy in several respects. First, in the struggle with the privity and warranty concepts the Court emancipates itself, if somewhat obliquely, from the context of the law of contracts, evidently anticipating a return to the historic tort environment of warranty.[82] Secondly, the opinion repudiates privity in a new context, *i.e.*, of an industrial consumer which suffers commercial loss because it relies on a manufacturer's promotional claims. One may wonder whether typically an industrial firm is as naive as a private consumer about an industrial product, as incapable of testing it, as much in need to be protected against parties other than its "privies,"[83] or as weak in absorbing or distributing on a loss. Thirdly, the Court places heavy emphasis on modern marketing and advertising practices in a purely commercial context. Does the opinion mark the emergence of a new principle of strict liability for innocent misrepresentations made in the course of present-day marketing campaigns?

Goldberg v. Kollsman Instrument Corp.

A little over a year later, Judge Desmond completed the first cycle of New York's modern warranty cases by his majority opinion in *Goldberg v. Kollsman Instrument Corp.*[84] Again, the opportunity to state a new principle against the backdrop of a simple and compelling fact situation eluded the Court. Plaintiff's daughter, a fare-paying passenger, had died in the crash of an American Air-

81. A different rule for commercial losses may apply to warranties that are merely implied, Seely v. White Motor Co., 63 Cal. 2d 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

82. Randy Knitwear Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 10-11 n.2, 181 N.E.2d 399 n.2, 226 N.Y.S.2d 363, 366 n.2 (1962), stresses the purely historical accident that tied the warranty concept to contract rather than tort law which gave birth to it. Later the opinion flatly refuses to exempt defendant from "strict liability" because fabric shrinkage rather than a personal injury was involved; *Id.* at 15, 181 N.E.2d at 403-04, 226 N.Y.S.2d at 370.

83. Perhaps in this case the plaintiff was akin to a private consumer in one respect—its suppliers had apparently been able to disclaim all warranties, see Randy Knitwear Inc. v. Fairtex, 7 N.Y.2d 791, 163 N.E.2d 349, 194 N.Y.S.2d 530 (1959).

84. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

line's plane in New York. Could the plaintiff, as her daughter's administratrix, maintain a wrongful death action for breach of implied warranty of fitness against Lockheed, the plane's manufacturer and against Kollsman, the producer of the allegedly defective altimeter that caused the crash? In Judge Desmond's words, the Court had "granted leave to appeal [from the dismissals below] to take another step toward a complete solution of the problem partially cleared up [by the two preceding decisions]."[85] These had made it clear that a breach of warranty is "a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."[86] For Judge Desmond *MacPherson v. Buick* was an extension of "court-made" negligence liability to a noncontracting consumer. Similarly, the Court's two preceding privity decisions already had extended manufacturer's liability for his defective product. He now was liable to a noncontracting consumer for breach of implied warranty if the article is a source of danger to one whose use is contemplated. "[I]t is no extension at all to include airplanes and the passengers for whose use they are built. . . ."[87] Judge Desmond approved the break with the past, emphasizing as "surely . . . more accurate" Chief Judge Traynor's reference to the new duties owing to consumers as based on "strict tort liability." Yet for the present at least, the Chief Judge refused to extend it to Kollsman, the manufacturer of the defective component, since he thought the protection afforded to users by holding the airplane manufacturer liable was adequate.

Clearly, Judge Desmond's ruling with respect to the airplane manufacturer is consistent with the language and mood if not the facts of the previous decisions. That the injured consumer contracted for a "service" instead of buying the manufacturer's product appears hardly significant once it had become clear that the Court had left behind the narrow terms of the Uniform Sales Act. Furthermore, it would have been a surprising retreat if the Court had decided to immunize manufacturers which supply service equipment to carriers because the latter are only liable for breach of due care regarding both equipment and service. To carve out at this juncture an immunity for certain manufacturers from a broad principle that has barely been introduced would have been both difficult and productive of unforeseeable complications.

The only really startling aspect of the opinion is its bold and frankly pragmatic approach to the issue of the instrument maker's liability. Although it allegedly made the defective product, the opinion was willing to accord it immunity from strict liability; yet, it is made very clear that the rule of immunity is tentative only. Presumably, the fear of crushing small enterprises with potentially huge damage claims contributed to this "abstention" as much as the justification offered explicitly. Yet, what will keep the plane-maker from suing

85. *Id.* at 433, 191 N.E.2d at 81, 240 N.Y.S.2d at 593.
86. *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.
87. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

Kollsman for breach of warranty unless some novel variant of *Hadley v. Baxendale* is invoked to spare the defendant? Or is the problem to be resolved on an *ad hoc* basis, so that the maker of a component part will be held whenever "justice and equity" require it? We will have to wait for the answers.

The pioneering, "activist," character of Judge Desmond's opinion stands out in the light of Judge Burke's dissent which, in substance, is a plea for judicial abstention. It, in part, conceded that the Court had moved "beyond the purpose and policy of the Sales Act" toward a strict products or enterprise liability.[88] Yet, it scored the holding as unsupported by the new rationale. According to Judge Burke, that rationale seeks not to influence conduct—that is the job of liability based on fault—but to place the loss on the enterprise strategically best situated to distribute it. In his view that enterprise is the airline, not the plane's manufacturer, and in making the plane manufacturer strictly liable, the holding creates an anomaly: the "dominant" enterprise, *i.e.*, the carrier, is liable to its passenger for due care only, while the supplier of the aircraft is strictly liable. For Judge Burke, to change the basis of liability of airlines to their passengers, is not a judicial but a legislative function; legislatures alone have access to the information needed to reach a proper decision.

Evidently, the division among the judges is symptomatic of clashing philosophies about the judicial function. It is, of course, true that the law of torts has traditionally been developed by judge-made rather than statutory law. Yet, the dissent appears to ask: How valid is this tradition in an industrial society in which the complexity, subtlety and variety of economic interrelations is staggering and in which any change of a tort rule may have far-ranging and unforeseen consequences? The majority evidently does not believe in judicial abstention in the face of this problem. It is plainly convinced that the time has arrived to place the risk of industrial mishaps on industry rather than on the consumer. Judges must not postpone the fulfillment of this demand of social justice to the ideal morning after a listless legislature has investigated and decided. As in the past, judicial innovation must run the risk of producing anomalies and even errors. Anomalies and errors may, in turn, call for further innovation or stimulate legislative action that otherwise might never have been forthcoming. It was surely appropriate for our Chief Judge to be the majority's spokesman on this occasion.

88. *Id.* at 439, 191 N.E.2d at 85, 240 N.Y.S.2d 597.